

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 1258

ALLOY PROPERTY COMPANY, LLC—ADVERSE ABANDONMENT—CHICAGO
TERMINAL RAILROAD IN CHICAGO, ILL.

Digest:¹ The Board is granting, subject to trail use, environmental, and labor protective conditions, the application by Alloy Property Company, LLC, for adverse abandonment.

Decided: April 30, 2018

On October 12, 2017, Alloy Property Company, LLC (Alloy) filed an application under 49 U.S.C. § 10903, requesting that the Board authorize the third-party (“adverse”) abandonment of 2.625 miles of rail line owned by the Chicago Terminal Railroad (CTM) in Chicago, Cook County, Ill., originating at the western side of North Elston Avenue and proceeding east and south to Goose Island to a terminus near the intersection of North Branch Street and Halsted Street (the Line). Alloy states there is no need for rail service on the Line. CTM does not oppose the application. Notice of the application was served and published in the Federal Register on November 27, 2017 (82 Fed. Reg. 56,101).

BACKGROUND

On June 1, 2017, Alloy filed a petition seeking a waiver of certain Board regulations and exemptions from related statutory provisions in anticipation of its filing of an adverse abandonment application. CTM filed a reply to Alloy’s waiver petition on June 21, 2017, opposing some of Alloy’s requests for waivers and stating that it would oppose an application for adverse abandonment. In a decision served August 16, 2017, the Board granted in part Alloy’s waiver petition. On September 18, 2017, CTM filed a motion to compel discovery from Alloy. In a decision served October 25, 2017, the Board referred the handling of all discovery matters to an Administrative Law Judge (ALJ).

Alloy filed its adverse abandonment application on October 12, 2017, stating that there is no need for rail service on the Line. Alloy contends that no rail shipments have originated or terminated on the Line since 2015 and that any businesses on the Line that could have sought rail

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

service have ceased operations, relocated, or are using non-rail transportation options. Alloy asserts that it is working with the City of Chicago (the City) to redevelop the property into a mixed-used urban center.

On January 16, 2018, CTM filed a motion to withdraw its motion to compel and a reply indicating it no longer opposes Alloy's application for adverse abandonment. The same day, Alloy and CTM filed a joint motion to restart the procedural schedule. The ALJ granted CTM's motion to withdraw on January 25, 2018. By decision served on January 31, 2018, the Board restarted the procedural schedule.

The Board has received letters in support of Alloy's application from the City, United States Representative Mike Quigley, Alderman Walter Burnett, Jr., Alderman Bruce Hopkins, and the Friends of Goose Island.

On February 14, 2018, the City submitted a request for the issuance of a Certificate of Interim Trail use (CITU) over the Line except for the portion north of West Cortland Street. That same day, CTM filed a letter stating that it is willing to negotiate for trail use with the City. Alloy filed a reply on March 1, 2018, indicating that it does not object to the issuance of a CITU over the requested portion of the Line.

DISCUSSION AND CONCLUSIONS

As explained below, the Board finds that granting adverse abandonment here, subject to certain conditions, is consistent with § 10903. Accordingly, the Board grants Alloy's unopposed application for adverse abandonment.

Legal Standard. Under 49 U.S.C. § 10903(d), the standard that applies to any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in a third-party or adverse abandonment context, the Board considers whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests. See N.Y. Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). See also Seminole Gulf Ry.—Adverse Aban.—in Lee Cty., Fla., AB 400 (Sub-No. 4) (STB served Nov. 18, 2004). As part of the PC&N analysis, the Board must consider whether the proposed abandonment would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d). The environmental impacts of the proposed abandonment also must be considered, and, pursuant to 49 U.S.C. § 10903(b)(2), affected rail employees must be adequately protected.

The Board has exclusive and plenary jurisdiction over rail abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. See Modern Handcraft, Inc.—Aban., 363 I.C.C. 969, 972 (1981). Accordingly, the Board typically preserves and promotes continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic. See Chelsea Prop. Owners—Aban.—Portion of Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y.C., N.Y., 8 I.C.C. 2d 773, 779 (1992), aff'd sub nom. Consol. Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir.

1994). On the other hand, the Board does not allow its jurisdiction to be used as a bar to state law remedies in the absence of an overriding federal interest. See Kan. City Pub. Serv. Freight Oper.—Exemption—Aban. in Jackson Cty., Mo., 7 I.C.C. 2d 216 (1990). See also CSX Corp. & CSX Transp., Inc.—Adverse Aban. Application—Can. Nat’l Ry. & Grand Trunk W. R.R., AB 31 (Sub-No. 38) (STB served Feb. 1, 2002). If adverse abandonment is granted, the decision removes the agency’s jurisdiction, enabling the applicant to pursue other legal remedies against the incumbent carrier, if necessary. See Consol. Rail Corp., 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

PC&N Analysis. Applying the above principles to this case, the Board finds that the present and future PC&N permit the proposed adverse abandonment. The record demonstrates that there is no present or future need for common carrier rail service. Alloy states, and CTM agrees, that no shipments have originated or terminated on the Line since 2015 and that there are no reasonable prospects for developing future rail traffic over the Line. Further, Alloy contends that the public interest favors granting its application because it is working to transform the property “into a major mixed-use development that will benefit residents, businesses, and visitors.” (Alloy Appl. 2.) CTM does not contest this assertion.

As noted, the Board has received four letters of support favoring Alloy’s application. The City submitted a detailed letter with exhibits explaining that the Line is located within an area known as the North Branch Industrial Corridor (the Corridor). According to the City, the Chicago Plan Commission adopted a land use policy called the North Branch Framework Plan (Framework Plan) in May 2017, which “embraces changes to land use policy within the Corridor to attract innovation and technology-oriented businesses (as opposed to new heavy industrial ones) with the goals of fostering new mixed-use neighborhoods and publicly accessible open space.” (The City Ltr. 2-3.) Congressman Quigley, Alderman Burnett, Alderman Hopkins, and the Friends of Goose Island all, likewise, support Alloy’s application for adverse abandonment. (See generally Quigley Ltr.; Burnett Ltr.; Hopkins Ltr.; Friends of Goose Island Ltr.)

Given the record evidence that there is no present or future need for rail service over the Line and the support of the Framework Plan from the City and public officials, the Board determines that the present and future PC&N support the requested adverse abandonment.

Environmental Matters. The Board is required to consider the environmental impacts of the proposed abandonment to meet its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. Alloy submitted a combined environmental and historic report with its application and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board’s Office of Environmental Analysis (OEA) examined the environmental and historic report, verified its data, and analyzed the probable environmental effects of the proposed action. OEA issued for public review and comment an Environmental Assessment (EA) on November 13, 2017.

In the EA, OEA recommended that two conditions be placed on any decision granting abandonment authority. First, in response to a comment in the historic report from the Illinois State Historic Preservation Officer (SHPO), OEA recommended a condition requiring Alloy and

CTM to retain interest in and take no steps to alter the historic integrity of all sites, buildings, structures, and objects within the project right-of-way that are eligible for listing or listed in the National Register until the Section 106 process of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, has been completed. Second, OEA recommended a condition requiring Alloy to consult with the National Geodetic Survey (NGS) and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.

OEA received comments on the EA from Alloy, the Miami Tribe of Oklahoma, and the U.S. Coast Guard (Coast Guard), and addresses those in its Final EA dated March 7, 2018. As a result of these comments and its own analysis, OEA recommends modifying one condition and adding three more conditions, as discussed below.

In its comment on the EA, Alloy contends that the Section 106 condition under NHPA should be limited to the swing bridge, as this is the only structure identified by the SHPO as eligible for listing on the National Register and as being adversely affected by the proposed abandonment, and that the condition should apply only to Alloy, not Alloy and CTM. OEA agrees that the Section 106 condition should apply only to the swing bridge and recommends modifying that condition accordingly. OEA does not, however, agree that the entire Section 106 condition should be imposed only on Alloy. As OEA notes, the portion of the condition requiring both the third-party applicant and the railroad to keep the swing bridge intact until the Section 106 process is complete ensures that the Board will fulfill its obligation under the NHPA. Thus, OEA continues to recommend imposing that portion of the Section 106 condition on both Alloy and CTM.

Alloy also suggests that the NGS consultation condition be removed. Alloy states that it does not believe that any geodetic station markers exist along the Line because Alloy narrowed the scope of the proposed abandonment from 2.875 miles to 2.625 miles. In response, OEA notes that NGS originally identified three geodetic station markers, but that NGS later modified that to two station markers, presumably after learning that Alloy had shortened the length of the line proposed for abandonment. Therefore, because it is not clear whether any geodetic station markers remain on the Line, OEA believes the NGS consultation condition is still warranted.

The Miami Tribe of Oklahoma submitted a letter dated December 4, 2017, indicating that it has no objection to the abandonment, but requesting immediate consultation if any human remains or Native American cultural items falling under the Native American Graves Protection and Repatriation Act or archeological evidence is discovered during any phase of the proposed abandonment. OEA, accordingly, recommends that, in the event any unanticipated archeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, Alloy will immediately cease all work and notify OEA, interested federally recognized tribes, the SHPO, and the Miami Tribe of Oklahoma Tribal Historic Preservation Officer (THPO), pursuant to 36 C.F.R. § 800.13(b).

On November 30, 2017, the Coast Guard commented that the proposed abandonment includes a federally permitted drawbridge over the North Branch Canal of the Chicago River, a federal navigable waterway, and a bridge under the jurisdiction of the Coast Guard. The Coast

Guard indicated that the federal permit is transferable, with all the responsibilities and requirements to comply with federal bridge statutes and regulations transferred to the new legal owner. Accordingly, OEA recommends a condition that Alloy consult with the Coast Guard regarding the permit for the bridge.

Upon its own review, OEA also recommends an additional condition requiring CTM to cooperate as necessary to facilitate the successful and timely completion of the recommended conditions. OEA notes that a third-party applicant does not typically have any right to access the property until the adverse abandonment is granted and the line is no longer part of the national rail network. OEA believes that such a condition will improve and expedite the process and ensure compliance with the conditions that must be satisfied before salvage.

The Board adopts the analysis and recommendations in the Final EA. Based on OEA's recommendations, the Board concludes that the proposed adverse abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

Labor Protection. In approving this application, the Board must ensure that affected railroad employees will be adequately protected. 49 U.S.C. § 10903(b)(2). The Board has found that the conditions imposed in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), satisfy the statutory requirements and will impose those employee protective conditions here.

Trail Use. On February 14, 2018, the City submitted a request for the issuance of a CITU over most of the Line. The City is not seeking a CITU over the portion of the Line north of West Cortland Street. In a letter filed February 14, 2018, CTM states that it is willing to negotiate for trail use with the City. In a reply filed March 1, 2018, Alloy indicates that it does not object to the issuance of a CITU over the requested portion of the Line.²

² On March 5, 2018, Burgoyne, LLC (Burgoyne), filed a letter stating that the portion of the Line covered by the CITU includes a disputed easement over Burgoyne's land. Burgoyne indicates that it is engaged in state court litigation with CTM regarding the contract for the easement. Burgoyne argues that the easement terminated per the terms of the contract and that CTM no longer has any rights to the easement. Burgoyne asks that the Board not include the easement portion as part of the CITU. On March 23, 2018, the City and CTM—in separate filings—requested leave to file replies to Burgoyne's letter.

The Board will deny Burgoyne's request. The property at issue in Burgoyne's state litigation is part of the Line being authorized for abandonment. Under the National Trails System Act and the Board's implementing rules, if a prospective trail user (here, the City) requests a trail condition and the carrier indicates a willingness to negotiate a trail agreement, the Board has a limited ministerial role and must issue the CITU. See Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990); see also Caddo Valley R.R.—Aban. Exemption—In Clark, Pike, & Montgomery Cts., Ark., AB 1076X (STB served Feb. 27, 2013); Rutherford R.R. Devel. Corp.—Aban.

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The Board's role under the National Trails System Act, 16 U.S.C. §§ 1241-51, is limited and largely ministerial. Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1151-52 (D.C. Cir. 2001); Goos v. ICC, 911 F.2d 1283, 1295 (8th Cir. 1990). Here, the City has satisfied the requirements for interim trail use/rail banking by providing a statement of willingness to assume financial responsibility for the Line and acknowledging that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. Moreover, CTM has stated that it agrees to interim trail use negotiations. (CTM Ltr., Feb. 14, 2018.) Alloy has also consented. (Alloy Reply 3, Mar. 1, 2018.) Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and CTM is willing to negotiate for interim trail use, a CITU will be issued. See Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y.C., N.Y., AB 167 (Sub-No. 1094A), slip op. at 8 (STB served June 13, 2005). The parties may negotiate an interim trail use agreement for the Line during the 180-day period prescribed below. If an interim trail use agreement is reached, the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(c)(2), (h). Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012). If no agreement is reached within 180 days, the Line may be fully abandoned, subject to the other conditions described below. 49 C.F.R. § 1152.29(c). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

It is ordered:

1. Alloy's adverse abandonment application is granted subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979), and subject to the conditions that:

(a) Alloy and CTM shall retain their interest in and take no steps to alter the historic integrity of the swing bridge located on the rail line until the Section 106 process of the NHPA, 54 U.S.C. § 306108, has been completed. Alloy shall report back to OEA regarding any consultations with the SHPO, any other Section 106 consulting parties, and the public. Alloy may not file a consummation notice or initiate any salvage activities for the swing bridge until the Section 106 process has been completed and the Board has removed this condition.

(b) Alloy shall consult with the NGS and notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers.

(c) In the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, Alloy shall immediately cease all work and notify the OEA, interested federally recognized tribes, the SHPO, and the THPO pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with the SHPO (or THPO),

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Exemption—In Rutherford Cty., N.C., AB 567 (Sub-No. 1X) (STB served Aug. 25, 2000). The issuance of the CITU here is not intended to address the merits of any pending litigation.

interested federally recognized tribes, Alloy, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

(d) Prior to the commencement of any salvage activities, Alloy shall consult with the Coast Guard regarding the permit for the bridge.

(e) CTM shall cooperate as necessary to facilitate the successful and timely completion of the above conditions.

2. The City's request for a CITU, under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29, for the Line is granted for the portion of the Line extending from the western side of North Elston Avenue and proceeding east and south to Goose Island to a terminus near the intersection of Chicago Avenue and Halsted Street. This does not include the small portion of the Line north of West Cortland Street, which Alloy may abandon upon the effective date of this proceeding provided that all other relevant conditions have been met.

3. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

4. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities described in ordering paragraph 3 above.

5. If an agreement for interim trail use/rail banking is reached by October 27, 2018, the parties shall jointly notify the Board within 10 days that an agreement has been reached, 49 U.S.C. § 1152.29(d)(2) and (h), and interim trail use may be implemented. If no agreement is reached by that time, the abandonment authority granted in this decision and certificate shall be fully effective, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29 (c)(1).

6. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the rail line covered by the interim trail use agreement, it must send the Board a copy of this decision and certificate and request that it be vacated on a specified date.

7. Burgoyne's March 5, 2018 request that the Board not include the portion of the rail line involving the disputed easement as part of the CITU is denied.

8. CTM's and the City's requests to file replies to Burgoyne's March 5, 2018 letter are denied.

9. This decision is effective on May 30, 2018. Any petition to stay or petition to reopen must be filed as provided at 49 C.F.R. § 1152.25(e).

By the Board, Board Members Begeman and Miller.